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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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WASHINGTON, D.C. 20541

In the Matter of)
)
Implementation of Section 255 of)
the Telecommunications Act of 1996) WT Docket No. 96-198
)
Access to Telecommunications Services,)
Telecommunications Equipment, and)
Customer Premises Equipment by)
Persons With Disabilities)

REPLY COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Cellular Telecommunications Industry Association ("CTIA")¹ hereby submits its Reply Comments in the above-captioned proceeding.²

I. INTRODUCTION AND SUMMARY

The Commission's rules implementing Section 255 should establish reasonable standards governing readily achievable access solutions and develop an approach that allows maximum flexibility for carriers and manufacturers to provide

1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

2 Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, *Notice of Proposed Rulemaking*, FCC 98-55 (rel. Apr. 20, 1998) ("Notice").

accessibility in a competitive marketplace. By amending the Communications Act of 1934, as amended ("Act"), to provide for the regulation of access to telecommunications equipment and services, Congress anticipated that the Commission would use its expertise when making telecommunications access decisions. While some commenters have sought to expand the scope of Section 255, the Commission should resist such efforts and follow Congress' mandate.

Congress sought to limit manufacturer and carrier obligations to only those access solutions that can be easily accomplished and secured cost effectively. Implicit in this standard is a requirement that the Commission adopt a flexible approach to implementing the terms of Section 255. What is readily achievable for one carrier or manufacturer may not be for another. What is readily achievable for a wireline carrier may not be for a wireless service provider. As noted in CTIA's Comments, Commission regulation under Section 255 should not impair the CMRS industry's ability to meet marketplace demands, nor impose heavy-handed regulation which could stifle this vibrant sector of the economy.

Furthermore, proper resolution of readily achievable access complaints regarding telecommunications services and equipment requires a more reasonable complaint process than that proposed in the Notice. Altering the complaint proposal to meet minimal procedural and legal requirements as well as to establish rational deadlines better serves the objectives of Section 255. The proposed complaint process lacks minimal standing

requirements and a statute of limitations, and creates an impractical five day fast track response process. Such process will likely engender dispute, rather than resolve key accessibility issues.

II. THE COMMISSION SHOULD ADOPT ACCESSIBILITY RULES CONSISTENT WITH THE LANGUAGE OF SECTION 255 AND CONGRESSIONAL INTENT.

A. The Commission Should Not Cede Its Authority To Implement Section 255 To The Access Board.

Section 255(e) requires the Architectural and Transportation Barriers Compliance Board ("Access Board") develop guidelines for accessibility to telecommunications equipment and CPE "in conjunction with" the Commission. The Access Board, however, would eliminate the Commission's role when it asks the Commission to adopt its guidelines without change.³ Similarly, several commenters request that the Commission essentially disregard Section 255's mandate, expand the scope of the Access Board's role, and adopt the Access Board guidelines for both telecommunications services and equipment in their totality.⁴

Notwithstanding these assertions, it is clear from the statute and its associated legislative history that the Access Board guidelines are intended to be advisory. There is no indication by Congress that the Commission must blindly adopt them. Had Congress intended the Access Board's role to be prescriptive, it would have stated so explicitly in Section 255. Furthermore, the Commission should not overlook that Congress

³ Access Board Comments at 1-3.

⁴ See, e.g., The World Institute on Disability Comments at 2.

amended the Communications Act, and not the Americans with Disabilities Act ("ADA"), to provide for accessibility to telecommunications services. Had Congress intended for the Commission merely to rubber-stamp the Access Board's guidelines, it would not have amended the Communications Act, the organic statute for which Congress has given the Commission primary responsibility for construing.⁵

Congress provided the Access Board, an agency with particular experience in achieving related goals, with an advisory role in the issue of equipment accessibility. Accordingly, the Commission's final rules on this matter should utilize the Access Board's guidelines for guidance, but they need not be adopted wholesale to comply with Section 255. In fact, doing so would diminish the Commission's role as the expert agency for the telecommunications industry.

Moreover, suggestions by some commenters that the Access Board's guidelines should be extended to telecommunications services, as well as to equipment and CPE, should not be

⁵ In support of its argument, the Access Board relies upon the legislative history of a deleted provision of Section 255. On the basis of this history, the Access Board concludes that "it would be contrary to Congressional intent if the FCC were to use its discretionary rulemaking authority to develop regulations for Section 255 which are inconsistent with the Board's guidelines." Access Board Comments at 1-3. A more reasonable interpretation is that Congress did not intend for the Commission to simply use its rulemaking authority as a rubber-stamp for the Access Board, and omitted such legislative language accordingly. To conclude otherwise, and to adopt the guidelines without independent evaluation and revision, would be contrary to this intent.

followed.⁶ The statute expressly limits the scope of the guidelines and the Access Board's responsibility for periodic updates to equipment and CPE issues. Congress did not grant authority to the Access Board to promulgate guidelines for telecommunications services. To expand the Access Board's authority to telecommunications service would be to assume wrongly that Congress excluded telecommunications services as an oversight. There is no basis at this time for the Commission to disregard the language of the statute and apply the guidelines as a one-size-fits-all approach to telecommunications services and products.

Furthermore, reliance upon the Access Board to set the relevant Section 255 standards will likely delay implementation of Section 255 and leave unresolved for extended periods of time a host of telecommunications specific matters -- matters better handled by the Commission. To illustrate, the Access Board is concerned that the manner in which Section 255 is implemented by the Commission may, at times, affect the implementation of the ADA.⁷ If Congress had intended the ADA to be the sole authority

⁶ See, e.g., American Council of the Blind Comments at 3; Telecommunications for the Deaf ("TDI") Comments at 6 ("TDI expects the Access Board's guidelines to be incorporated in their entirety as a minimum starting point for the implementation of both telecommunications products and services. . . .") (emphasis in original).

⁷ See Access Board Comments at 4 ("Since the term 'readily achievable' has its origins in the [ADA], the Board is especially concerned that including cost recovery considerations in the FCC's regulation may have negative consequences for determining what is readily achievable in the context of the ADA.")

with respect to accessibility, it would have amended the ADA, not the Act. Allowing the Access Board to impose the ADA as primary authority over the Act would thwart the purpose of Section 255. In other words, Congress intended, and for good reason, that accessibility to telecommunications services and equipment be addressed differently than they would be considered in the ADA. Thus, Section 255 should be implemented pursuant to the Commission's interpretation and expertise.

B. The Commission Should Incorporate Telecommunications Specific Factors Into The Readily Achievable Standard.

The Commission has an obligation to utilize its expertise in regulating the telecommunications industry when interpreting Section 255. While Congress stated that the term "readily achievable" be given the meaning that it has in the ADA, Congress also provided the Commission with authority to interpret that meaning. It stands to reason that the Commission's interpretation include telecommunications specific factors.

The Access Board and other commenters object to the Commission's decision to include telecommunications specific matters in the definition of "readily achievable." Some argue that such an interpretation is inconsistent with the ADA definition.⁸ This viewpoint fails to account for the fluid nature of the ADA's readily achievable standard. Moreover, as a practical matter, the Commission can and should adopt an approach to readily achievable that considers telecommunications

⁸ See, e.g., Access Board Comments at 4; The World Institute on Disability Comments at 5.

accessibility because many of these factors are necessary in a competitive environment.⁹

The readily achievable standard, as defined by the ADA, means:

easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include -- (A) the nature and cost of the action needed under [the ADA] ; (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.¹⁰

Use of the term "include" in terms of statutory construction means that the information following it is representative and not all encompassing. Under the ADA definition, the Commission has discretion to add additional factors for consideration in determining what is "readily achievable." Certainly, the Commission has the discretion to include relevant telecommunications factors, given its expertise in the telecommunications arena.

Moreover, the factors listed in the ADA definition necessarily encompass many of the telecommunications specific

⁹ See, e.g., the Commission's decision to consider cost recovery, practicality, and feasibility in the "readily achievable" analysis.

¹⁰ 42 U.S.C. § 12181(9) (emphasis added).

factors proposed by the Commission: feasibility, expense and practicality. That is, the nature and the cost of the action needed, the effect on industry resources, or the impact otherwise of such action upon the operation of the facility require inquiry into issues of feasibility, expense, and practicality.

While most commenters agree that readily achievable determinations must be conducted on a case-by-case basis, this does not restrict the Commission's ability to establish definite standards from which to make its decision. To the contrary, by revising the Communications Act and not the ADA to impose Section 255 duties, Congress intended for the Commission to tailor the readily achievable standard so that it better reflects the telecommunications market. For instance, the Commission's intention to consider the ability of carriers to recover the cost of implementing new requirements when determining whether they are readily achievable is entirely appropriate. Such considerations have always been, and should continue to be, an important component of wireless communications regulations.¹¹ Section 255's reliance upon the ADA definition of "readily achievable" does not require otherwise.

¹¹ See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Report and Order, 11 FCC Rcd. 18676, ¶ 89 (1996) ("[W]e have made implementation of E911 services contingent upon the adoption of a cost recovery mechanism. . . ."); see also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Third Report, FCC 98-91 (June 11, 1998) (concluding that the CMRS industry operates in a competitive environment).

Moreover, given the diverse nature of the telecommunications industry a tailored approach to Section 255 enforcement is appropriate. CMRS providers which operate in a competitive market are constrained by market forces. Other factors, including technical feasibility, will also depend upon the nature of the telecommunications service, equipment, or CPE involved, whether wireless or wireline.¹² Neither the definition of "readily achievable" in the ADA nor the policy goals of Section 255 support a narrow interpretation of the "readily achievable" standard which would foreclose consideration of the telecommunications factors the Commission has proposed.

The Commission should also clarify that the readily achievable standard includes a transitional period to account for the typical design cycle. In other words, once the Commission adopts its rules, what is readily achievable for different products and services may vary depending upon their stage of development. Because most readily achievable solutions will be possible only in the beginning of the design phase, the Commission's rules should either have a delayed effect or clearly provide for prospective implementation.¹³

¹² See CTIA Comments at 6-10 (explaining that certain alterations to mobile phones, while theoretically possible, may not be technically feasible). Obviously, equipment alterations which would add ten pounds to a mobile handset are not technically feasible while ten pounds added to a payphone may be.

¹³ See Telecommunications Act Accessibility Guidelines, 63 Fed. Reg. 5608, 5612 (1998) (concluding that the readily achievable definition already comprehends this kind of delayed effect because the obligation to make products accessible only arises if it is readily achievable. If a modification cannot be completed except at the initial

C. Section 255 Is Limited To The Provision Of Telecommunications Services, CPE, And Telecommunications Equipment.

Notwithstanding commenter assertions,¹⁴ enhanced and information services are not covered by Section 255. By its terms, Section 255 is limited to telecommunications equipment, CPE, and telecommunications services. Had Congress intended to include enhanced services in the definition of covered services, it would have done so expressly.¹⁵ At a minimum, Congress could have provided the Commission with authority to add to the list of covered services.¹⁶ When Congress is clear, however, the Commission cannot read into the Communications Act requirements which are not contemplated.¹⁷

D. Accessibility Determinations Should Be Made For Product Lines, And Not For Each Individual Product.

Most commenters agree with CTIA and the Telecommunications Access Advisory Committee that "it may not be readily achievable to make every type of product accessible for every type of

design phase, it is not readily achievable.) Moreover, under no circumstances should the Commission resort to retrofitting as a readily achievable accessibility solution.

¹⁴ See American Council of the Blind Comments at 4; The World Institute on Disability Comments at 4.

¹⁵ In the 1996 Act, Congress added the term information services to the Communications Act. 47 U.S.C. § 153(20). If Congress wanted Section 255 to govern information services, it would have expressly stated so in Section 255.

¹⁶ See 47 U.S.C. § 254(b)(7) (providing the Commission and the Joint Board with authority to establish additional principles of universal service).

¹⁷ See Sierra Club v. EPA, 129 F.3d 137, 140-41 (D.C. Cir. 1997) (agency prohibited from granting rights which were not provided for in the statute).

disability using present technology.'"¹⁸ As CTIA noted in its Comments, attaching accessibility obligations to every product in a product line is not only prohibitively expensive, it would likely result in unmarketable services and equipment.

Telecommunications for the Deaf agrees "that at times it may not be feasible to incorporate all potential access features into one product. In this case, it may be reasonable to consider products 'functionally similar' if they provide similar features and functions and are close in price."¹⁹ Generally, the comments make clear that it is not readily achievable to make every single piece of equipment accessible.²⁰

Considering the product line approach to accessibility will ensure that the industry remains dynamic while also realizing the principles of Section 255. If the Commission were to require that every product be accessible to persons with disabilities, it would likely cause a general delay in the deployment of all new products. In competitive, dynamic markets delaying the roll-out of new products and services (with short life cycles) will thwart the overall growth of the industry. Consistent with the terms of Section 255, the Commission should conclude that it is readily achievable to create individual products within a product line

¹⁸ Notice at ¶ 15 (quoting TAAC Report § 4.0 at 15).

¹⁹ TDI Comments at 7.

²⁰ See Motorola Comments at 8-9 ("It is not possible now, and probably not ever, to manufacture a piece of CPE that is accessible to every person with a disability. . . . [T]he FCC should embrace the policy of 'a product for every person, not every product for every person.'"); TIA Comments at 11.

that are accessible, but it is not possible to build accessibility into every product.

III. THE COMMISSION SHOULD ESTABLISH A COMPLAINT RESOLUTION PROCESS THAT MEETS MINIMAL LEGAL AND PROCEDURAL STANDARDS.

The comments are nearly universal in their lack of support for the five day complaint process.⁴¹ Given the lack of record support for the five day fast track proposal, the Commission should adopt a response time of 30 days.²²

In no other Commission proceeding is a party required to file a response to a complaint in five days. Even in the Commission's proceeding to accelerate resolution of formal Section 208 complaints (other than those filed under Section 255) the Commission's Rules require the responding party to answer within ten calendar days.²³ In these proceedings, however, the responding party is already aware that a complaint has been filed prior to the transfer of the complaint process to an Accelerated Docket schedule. In other words, under the Accelerated Docket procedures, a responding party fully prepared for and awaiting a complaint has ten days to respond. Yet in this proceeding, the Commission expects carriers or manufacturers to respond within five days to a complaint that arrives with little to no

²¹ See TDI Comments at 21 (supporting a complaint process of between ten and thirty days as being more reasonable).

²² See National Association of the Deaf Comments at 35.

²³ Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers, CC Docket No. 96-238, *Second Reports & Order*, FCC 98-154 at ¶ 47 (rel. July 14, 1998).

warning.²⁴ The focus of the Commission's complaint resolution process should be to resolve the need of customers with disability and not simply to adopt the fastest possible means of closing a file. An abbreviated process serves no one adequately, including intended beneficiaries, if it does not provide adequate time to address legitimate issues.

Many commenters also generally support minimal prerequisites for filing complaints such as standing requirements and a reasonable statute of limitations.²⁵ Such requirements conform with constitutional notions of due process and are crucial to a fair, efficient process. Moreover, these minimal obligations are fully consistent with the Commission's general procedures for complaint resolution, which protect the rights of all parties.²⁶

²⁴ CMRS services and equipment typically are marketed through retail distribution channels offering multiple carriers' services and equipment vendors' products. See CTIA Comments at 20. The Commission should anticipate receiving complaints involving retail customers who were unable to select a carrier or equipment because of the retailer's (often a mass merchandiser) conduct.

²⁵ See United States Telephone Association Comments at 14 ("Only customers of a service provider or manufacturer . . . should have standing to initiate a fast-track inquiry or an informal or formal complaint under Section 255.")

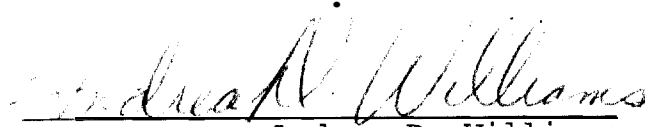
²⁶ For instance, the Commission has procedures regarding bona fide complaints, see 47 C.F.R. § 1.720, and has the right to consolidate complaints involving the same issue, see 47 C.F.R. § 1.227(a) (providing for the consolidation of cases involving the same applicant or substantially the same issues in formal hearing proceedings). The Commission should afford the same protections here.

IV. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission adopt rules governing Section 255 consistent with the proposals made herein and in CTIA's Comments.

Respectfully submitted,

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